Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION,
Petitioner,

v.

JIM C, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress may constitutionally compel a state agency, as a condition for receiving any federal funding for any purpose, to waive its Eleventh Amendment immunity from suits under Section 504 of the Rehabilitation Act of 1973.

PARTIES TO THE PROCEEDINGS

Petitioner is the Arkansas Department of Education. Respondents are Jim C. (individually and as parent and next friend of J.C.), Susan C. (individually and as parent and next friend of J.C.), and the United States. Other parties in the district court proceedings included the Atkins (Arkansas) School District and the Arch Ford Education Service Cooperative.

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The Arkansas Department of Education respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a) is reported at 235 F.3d 1079. The panel opinion of the court of appeals (Pet. App. 16a) is reported at 189 F.3d 745. The order of the district court (Pet. App. 39a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 22, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 1 of the United States Constitution states:

> The congress shall have power
>
> To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States . . . .

The Eleventh Amendment to the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTORY PROVISIONS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, states in relevant part:

> Nondiscrimination under Federal grants and programs
>
> (a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . . .

42 U.S.C. § 2000d-7(a) states in relevant part:

Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101 et seq.), title VI of the Civil Rights Act of 1964 (42

U.S.C. § 2000d et seq.), or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

This case presents fundamental questions about the scope of congressional power under the Spending Clause of the Constitution (Art. I, § 8, cl. 1). In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court held that, while Congress generally may attach conditions to the receipt of funds under federal spending programs, those conditions must be "related" or "germane" to the purpose of the expenditure, *id.* at 207-09 & n.3, and, in addition, must not "be so coercive as to pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (citation omitted). By a six-to-four vote, the Eighth Circuit in this case, sitting en banc, held that these Spending Clause limitations were not transgressed by a federal requirement that a state agency, in order to receive any federal funding for any purpose, must waive its Eleventh Amendment immunity from suits under section 504 of the Rehabilitation Act of 1973. Under the court of appeals' decision, petitioner, the Arkansas Department of Education, must either waive this constitutional immunity or lose some $250 million in federal funding, the vast majority of which has nothing to do with section 504's goal of eliminating discrimination against the handicapped.

1. Respondents Jim C. and Susan C. are the parents of J.C., an autistic child. Dissatisfied with the education provided to J.C., respondents sued petitioner and two other parties in

federal district court. Among other claims, respondents alleged violations of section 504 of the Rehabilitation Act of 1973, which provides in pertinent part that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).[1] Respondents sought money damages, and petitioner interposed an Eleventh Amendment defense. The district court rejected the defense on the ground that 42 U.S.C. § 2000d-7(a)(1), which provides in pertinent part that "[a] State shall not be immune under the Eleventh Amendment . . . from suits in Federal court for a violation of section 504 of the Rehabilitation Act of 1973," constituted a valid congressional abrogation of the defense. Pet. App. 31a.

2. On appeal, a panel of the Eighth Circuit unanimously reversed in relevant part and ordered the dismissal of respondents' section 504 claims. Applying *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, the panel concluded that the purported abrogation of Eleventh Amendment immunity exceeded the scope of congressional power under section 5 of the Fourteenth Amendment. Pet. App. 23a-27a. The panel also rejected respondents' alternative theory that, in light of section 504, petitioner had voluntarily waived its Eleventh Amendment immunity by accepting federal funds. Pet. App. 27a-29a.

Specifically, the panel concluded that section 504 was not a valid exercise of Congress's spending power because the conditions it imposed were both coercive and unrelated to the purpose of the Rehabilitation Act. The panel reasoned that

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[1] The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

> Congress's imposition of such conditions on a state violates the Constitution because it amounts to impermissible coercion: Arkansas is forced to renounce *all* federal funding, including funding wholly unrelated to the RA [Rehabilitation Act], if it does not want to comply with § 504. Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under § 504 or reject funding and retain its Eleventh Amendment immunity to such suits." Pet. App. 37a (emphasis added).[2]

3. On reheraring en banc, the Eighth Circuit concluded, by a six-to-four margin, that section 504 did constitute a valid exercise of congressional power under the Spending Clause. The court concluded that section 504's funding condition was sufficiently germane, and not impermissibly coercive, because it applied only to those particular agencies that accepted federal funds. Pet. App. 6a. The court recognized that, under that logic, a state agency, in order to preserve its Eleventh Amendment defense to claims under the Rehabilitation Act, would have to forfeit *all* of its federal funding, regardless of the amount of money at issue or the source and purpose of the funding. Pet. App. 6a. And the court further recognized that, in this case, the amount of federal funds subject to this forfeiture is approximately $250 million per year. Pet. App. 5a. Nonetheless, the court concluded that petitioner could "avoid

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[2] The panel also held that petitioner had waived its Eleventh Amendment defense to claims under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487, by accepting funds specifically provided under that statute. Unlike the purported Rehabilitation Act waiver, which is triggered by the acceptance of *any* federal funds for any purpose, the IDEA waiver is triggered only by acceptance of funds specifically provided under the IDEA.

the requirements of Section 504 simply by declining federal education funds." Pet. App. 5a. According to the court, "[t]he sacrifice of all federal education funds, approximately $250 million or 12 per cent of the annual state education budget . . . would be politically painful, but we cannot say that it compels Arkansas's [sic] choice." Pet. App. 5a.

The dissenting judges concluded that section 504's funding condition violated both the germaneness and the non-coerciveness requirements established by this Court in *South Dakota v. Dole*. With regard to coercion, the dissenters stressed that, in contrast to the spending condition at issue in that case, under which "South Dakota would lose only 5% of its federal money for highways if [it] declined to raise the minimum drinking age to twenty one," the spending condition at issue here "places at risk 100% of Arkansas' federal funding for education - some $250,000,000 a year at last report." Pet. App. 7a. With regard to germaneness, the dissenters stressed that "the condition (waiver of Eleventh Amendment immunity with respect to Rehabilitation Act claims) bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education." Pet. App. 10a. The dissenters again contrasted this case to *South Dakota v. Dole*, where "the condition imposed by Congress (raising the state's drinking age to twenty-one) was directly related to the federal interest in safe interstate travel." Pet. App. 8a-9a.

REASONS FOR GRANTING THE WRIT

At bottom, this case presents the question whether the Spending Clause of the Constitution has any meaningful and judicially enforceable limits. The court of appeals held that a state agency accepting *any* amount of federal funds for *any* reason can be compelled to forfeit an Eleventh Amendment defense specifically provided to the states by the Constitution, and not otherwise subject to congressional abrogation. The decision below thus eviscerates the critical Spending Clause

requirements of germaneness and non-coercion recognized by this Court in *South Dakota v. Dole*. Moreover, in so doing, it provides Congress with a blueprint for overriding, through the use of coercive and non-germane funding conditions, the entire body of this Court's recent decisions repeatedly confirming, both inside and outside the context of Eleventh Amendment abrogation, that the federal government is one of limited and enumerated powers. For these reasons, prompt review by this Court is essential.

I. THE DECISION BELOW EVISCERATES SPENDING CLAUSE LIMITATIONS IMPOSED BY THIS COURT IN *SOUTH DAKOTA V. DOLE*

In *South Dakota v. Dole*, this Court held that Congress's power under the Spending Clause to "attach conditions on the receipt of federal funds", although broad, is not unlimited 483 U.S. 203, 206 (1987). Of the several limitations sketched in that case, two are particularly relevant here.

First, the Court made clear that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207 (citation omitted). This "germaneness" requirement has deep legal roots and profound legal importance. It was applied in *United States v. Butler*, 297 U.S. 1 (1936), to strike down an untailored spending condition imposed under the Agricultural Adjustment Act. *See id.* at 73 ("There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."). Even outside the Spending Clause context, it is routinely applied to distinguish legitimate government bargains from "'out-and-out plan[s] of extortion.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (citation omitted); *see generally* Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1456-76 (1989); Epstein, *The Supreme Court, 1987*

Term Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv L. Rev. 4 (1988). And it serves an essential role in limiting federal power. As the Court explained in *New York v. United States*, 505 U.S. 144, 167 (1992), "conditions must . . . bear some relationship to the purpose of federal spending . . . otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."

Second, the *South Dakota v. Dole* Court made clear that a funding condition, to be constitutional, must not be coercive. As the Court explained, "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citation omitted). That principle is critical because, just as "the power to tax involved the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819), so too "[t]he power to confer or withhold unlimited benefits is the power to coerce or destroy," *Butler*, 297 U.S. at 71. The non-coercion principle has particular force in the context of putative waivers of constitutional rights, because all such waivers — including those of Eleventh Amendment defenses — must be knowing *and voluntary*. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 675 (1999); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The decision below eviscerates both of these crucial principles. In *South Dakota v. Dole*, this Court held that the germaneness requirement was satisfied only after concluding that the funding condition at issue (requiring states to raise their respective drinking ages to 21) was "directly related to one of the main purposes for which highway funds are expended — safe interstate travel." 483 U.S. at 208. By contrast, in the decision below, the court of appeals held that the germaneness requirement was satisfied even though section 504 itself provides *no* federal funds to assist the states in

educating handicapped children, and even though the vast bulk of federal funding of education serves entirely distinct purposes. Pet. App. 4a-6a.[3] In *South Dakota v. Dole*, this Court held that the non-coercion requirement was satisfied only after concluding that the conditioned funds were relatively small both in total amount ($4 to $8 million) and as an overall percentage of the specific federal spending program at issue (five percent). *See* 483 U.S. at 210; 791 F.2d 628, 630 (8th

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[3] To name only a few examples, petitioner receives federal funds under spending programs designed to increase participation of low-income students in advanced placement courses (*see* Higher Education Amendments of 1998, Title VIII, Part B, 20 U.S.C. § 1070a), to foster bilingual education (*see* Elementary and Secondary Education Act, Title VII, Part A, Subpart I, 20 U.S.C. § 7424), to encourage school attendance by homeless students (*see* McKinney Homeless Assistance Act of 1987, 42 U.S.C. § 11431-11435), to provide for professional development of teachers (*see* Elementary and Secondary Education Act, Title II, Part A, 20 U.S.C. §§ 6621-6623), to assist schools with large immigrant populations (*see* Elementary and Secondary Education Act, Title VII, Part C, 20 U.S.C. § 7541-7549), to address the special needs of migrant children (*see* Elementary and Secondary Education Act, Title I, Part C, 20 U.S.C. §§ 6391-6399), to provide special programs for neglected or delinquent children (*see* Elementary and Secondary Education Act, Title I, Part D, 20 U.S.C. §§ 6421-6472), and to combat drugs and violence in schools (*see* Elementary and Secondary Education Act Title IV, Part A, 20 U.S.C. §§ 7111-7117). None of these programs is even remotely related to assisting or preventing discrimination against the handicapped, the objective of section 504 of the Rehabilitation Act. Yet under the decision below, if petitioner accepts even a dime from any of these programs, it can permissibly be compelled to waive its Eleventh Amendment immunity from all claims under section 504.

Cir. 1986). By contrast, in the decision below, the court of appeals held that the non-coercion requirement was satisfied even though the funding condition encompassed *all* federal funds made available to petitioners, and even though the total amount of conditioned funds was some 40 times greater. Pet. App. 5a-6a. Indeed, the *only* limiting principle recognized by the court of appeals was that the federal government, in purporting to extract an Eleventh Amendment waiver from any state agency accepting any amount of federal funds for any purposes, did not additionally seek to extend the waiver to the entire State. Pet. App. 4a. If that requirement alone were sufficient to uphold the constitutionality of a funding condition, then the requirements of germaneness and non-coercion would be a dead letter, and the spending power would be virtually unlimited.

For that reason, this case presents an ideal vehicle for confirming that the Spending Clause has meaningful and judicially enforceable limits, much as *United States v. Lopez*, 514 U.S. 549 (1995), presented an ideal vehicle for confirming that the Commerce Clause similarly has meaningful and judicially enforceable limits. In *Lopez*, despite decades of modern precedents emphasizing the broad scope of the commerce power, this Court invalidated the Gun Free School Zones Act of 1990 as beyond the scope of that power. The Court concluded that the critical vice of that statute was that, under the theories urged in its defense, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564. Similarly here, because the Court has not actually invalidated a spending condition since *Butler*, one commentator has suggested that courts pay only "lip service" to the stated limits on the Spending Clause, Sullivan, 102 Harv. L. Rev. at 1432, while several judges have stated that such

limits exist only "if the Court meant what it said in *Dole*," *Virginia Dep't of Edu. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (six-judge plurality). Because the court of appeals paid *South Dakota v. Dole* only lip service in this case, and adopted reasoning that would make the Spending Clause virtually unlimited, this case cries out for the Court to define with greater precision the outer bounds of congressional power under the Spending Clause or, at a minimum, to confirm that the power is not unbounded.

II. A BROAD CONGRESSIONAL POWER TO IMPOSE NON-GERMANE AND COERCIVE SPENDING CONDITIONS WOULD SUBVERT FUNDAMENTAL PRINCIPLES OF FEDERALISM

By upholding the imposition of obviously non-germane and coercive funding conditions on any state agency that accepts any amount of federal dollars for any purpose, the court of appeals subverted not only the particular Spending Clause limitations imposed by this Court in *South Dakota v. Dole*, but also much broader principles of federalism repeatedly embraced by this Court over the past decade.

To begin with, the court of appeals' decision makes a mockery of this Court's recent Eleventh Amendment abrogation decisions. Within the last five years alone, the Court has held that Congress lacks power under Article I to abrogate any Eleventh Amendment immunities, *see Seminole Tribe v. Florida*, 517 U.S. 44 (1996); that Congress lacks power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunities against claims of illegal discrimination against the disabled, *see Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955 (2001); and that Congress lacks power to impose "constructive" Eleventh Amendment waivers that lack the traditional waiver requirements of knowledge and free choice, *see College Savings*, 527 U.S. at 675. These and related

decisions confirm that state immunity "is a fundamental aspect of the sovereignty" of the States, *Alden v. Maine*, 527 U.S. 706, 713 (1999); indeed, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). All of these holdings and principles would be meaningless if, as permitted under the court of appeals' decision, the Congress could secure a *de facto* abrogation by imposing on all state agencies a Hobson's choice between forfeiture of an Eleventh Amendment defense and forfeiture of every last nickel of federal funding, no matter how unrelated to the federal interest asserted in defense of the putative waiver.

Nor could the Eleventh Amendment damage be confined to claims under the Rehabilitation Act. A wide range of Spending Clause statutes, including section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, and Title VI of the Civil Rights Act of 1964, incorporate the same attempted abrogation provision, *see* 42 U.S.C. § 2000d-7(a), and the same agency-wide definition of the state "program or activity" subject to spending conditions, *see* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, 28-31. Under the decision below, a state agency accepting any federal funds for any purpose could be compelled to waive its Eleventh Amendment defenses to claims under all of these Spending Clause statutes. Indeed, if the decision below is upheld, congressional use of spending conditions to subvert this Court's recent anti-abrogation decisions can only be expected to accelerate.

The court of appeals' decision has similarly drastic federalism ramifications outside the specific context of Eleventh Amendment abrogation. For example, in recent years, this Court has held that Congress itself lacks the power to prohibit possession of weapons near schools, *see Lopez*, 514

U.S. 549, and to provide private rights of action for victims of gender-motivated domestic violence, *United States v. Morrison*, 529 U.S. 528 (2000); that Congress cannot compel the States to make affirmative accommodations for religious practices, *see City of Boerne*, 521 U.S. 507; and that Congress cannot compel the States to implement even otherwise permissible federal regulatory programs, *see Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144. But under the court of appeals' decision, Congress could compel the States to do all of these things — and more — by subjecting all of their agencies to non-germane and coercive funding conditions. As this Court itself has recognized, absent meaningful requirements of germaneness and non-coercion, the Spending Power would swallow up, and thus "render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167.

Yet other federalism principles would fall by the wayside. Even express constitutional limitations on federal power could be subverted such as, including the Eleventh Amendment limitations directly at issue here and the Tenth Amendment limitations at issue in *Printz* and *New York*. Moreover, no area of state authority would be safe from federal control through coercive and non-germane spending conditions. Indeed, this case on its facts involves federal regulation of education, which is "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citation omitted), and an area "where States have historically been sovereign," *Lopez*, 514 U.S. at 564. Given the existing framework of extensive federal taxing and spending, the States have no viable alternative but to accept at least some federal funding. The practical necessity of some federal funding of education, however, should not permit Congress to regulate this core state function by indirection, through the imposition of coercive and non-germane funding conditions.

The Fourth Circuit's recent en banc decision in *Riley*,

confirms the importance of the question presented in this case. In that case, an eleven-judge majority held that the Individuals With Disabilities Education Act ("IDEA") does not compel states accepting IDEA funds to provide free education to students expelled from school for misconduct unrelated to any disability. *See* 106 F.3d at 560-61. Speaking through Judge Luttig, a six-judge plurality further concluded that any such funding condition would violate the Spending Clause and the Tenth Amendment. *See id.* at 569 The plurality stressed that the germaneness and non-coercion requirements were not satisfied in that case because the putative spending condition would have extended to the entire $60 million IDEA grant, as opposed to the relatively small percentage of IDEA funds provided to educate the expelled children specifically at issue. *See id.* at 569. The plurality warned about the grave dangers to federalism if the Spending Clause were unduly expanded "in a time when the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from the citizens of the several States." *Id.* at 570. This case exemplifies those concerns.

* * * *

The four dissenting judges below correctly concluded that if the Spending Clause were construed "to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of 'a federal government of enumerated powers' [would] have no meaning." Pet. App. 9a. In adopting that vision of the Spending Clause, the decision below eviscerates the Spending Clause principles recognized by this Court in *South Dakota v. Dole*, the sovereign immunity principles recognized by this Court in cases such as *Seminole Tribe*, *Garrett* and *College Savings*, and, even more broadly, the federalism principles vigorously enforced by this Court for over a decade.

Immediate review is therefore essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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